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**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Hoist Fitness Systems, Inc.

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Serial No. 76428061

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LLP for Hoist Fitness Systems, Inc.

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(Thomas G. Howell, Managing Attorney).

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Before Hairston, Walters, and Drost, Administrative  
Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On July 8, 2002, Hoist Fitness Systems, Inc.  
(applicant) applied to register the mark QUIK-CHANGE, in  
typed form, on the Principal Register for "exercise  
equipment, namely a dumbbell system with a handle, weights  
and a stand" in Class 28. The application (Serial No.  
76428061), as amended, contains an allegation of a date of  
first use and a date of first use in commerce of June 19,  
2002.

The examining attorney has refused to register applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), because of a prior registration on the Supplemental Register for the stylized mark shown below for "sporting goods and sports equipment, namely, soccer;<sup>1</sup> soccer goal that has adjustable crossbar so that goal size can be reduced or enlarged" in Class 28.

## **Kwik Change**

The registration (No. 2,265,910) issued on July 27 1999, to Kwik Goal Ltd. The examining attorney had also refused to register applicant's mark on the ground that it was merely descriptive but that refusal was withdrawn.

The examining attorney's position (Brief at 4) is that the marks are "virtually identical in appearance, they are phonetically identical and they create the same commercial impression." The examining attorney has also submitted evidence to show that "dumbbells would be found in the same sporting goods market as the registrant's soccer equipment." Brief at 5. Applicant, on the other hand, points out that the marks are spelled differently and that

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<sup>1</sup>The repetition of this word appears to be a typographical error.

the "equipment needed for playing soccer and weight training are very different." Brief at 4.

After the examining attorney made the refusal final, this appeal followed.

We reverse.

Determining whether there is a likelihood of confusion requires application of the factors set forth in In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). See also In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); and Recot, Inc. v. Becton, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000). In considering the evidence of record on these factors, we must keep in mind that "[t]he fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We begin by comparing applicant's and registrant's marks to determine whether they are similar in sound, appearance, meaning, and commercial impression. We agree that the words KWIK CHANGE and QUIK-CHANGE would be pronounced the same and that their meanings would also be the same, i.e., to change quickly. Furthermore, we cannot

agree with applicant's argument that the marks' commercial impressions are not the same because "QUIK is very different from KWIK. Neither QUIK nor KWIK are actual words and therefore the public will be able to easily distinguish between these designations." Brief at 4. While we agree that QUIK and KWIK are spelled differently, their meanings would be the same and their commercial impressions would also be the same, i.e., alternative misspellings of the term QUICK CHANGE.

However, registrant's mark is on the Supplemental Register, which is an admission that the mark is descriptive. In re Consolidated Foods Corp., 200 USPQ 477, 478 n.2 (TTAB 1978) ("Registration of the same mark on the Supplemental register is not prima facie evidence of distinctiveness; in fact, such a registration is an admission of descriptiveness"). It has long been recognized that marks on the Supplemental Register may be cited under Section 2(d) of the Trademark Act. In re The Clorox Co., 578 F.2d 305, 198 USPQ 337 (CCPA 1978) (ERASE for a laundry soil and stain remover held confusingly similar to STAIN ERASER, registered on the Supplemental Register, for a stain remover). However, this "Board and the courts have recognized that merely descriptive and weak designations may be entitled to a narrower scope of

protection than an entirely arbitrary or coined word." In re Central Soya Co., 220 USPQ 914, 916 (TTAB 1984). We, therefore, take into consideration the descriptiveness of the cited mark as well as the fact that applicant's mark is at least suggestive of the fact that its weights may be changed quickly.

Therefore, the next question is whether the goods are related, and if they are related, how closely are they related. We point out that both applicant and registrant have one very specific item in their identification of goods. Applicant's goods are a dumbbell system with a handle, weights, and a stand while registrant's goods are a soccer goal that has an adjustable crossbar so that goal size may be reduced or enlarged. The examining attorney has offered several types of evidence to show that the goods are related. The first consists of copies of trademark registrations and applications that show soccer and exercise equipment. However, most of these registrations are either non-use based registrations or intent-to-use applications. Neither of these types of documents is entitled to much weight.

In the instant case, however, 11 of the 15 third-party applications and registrations which cover both restaurant services and mustard were filed under the provisions of Section 44 of the Act, that is, they are based on foreign registration rather than on use in

commerce, and most of their owners appear to have simply copied large parts of the title (including, in some cases, even the punctuation used therein) of International Class 30. Such registrations and applications are not even necessarily evidence of a serious intent to use the marks shown therein in the United States on all of the listed goods and services, and they have very little, if any, persuasive value on the point for which they were offered. Moreover, two of the four registrations which were based on use were issued to Saks & Company and to Knott's Berry Farm, owners of a large department store and an amusement or theme center, respectively, where a wide variety of goods and services are sold.

See In re Mucky Duck Mustard Co., 6 USPQ2d 1467, 1470 n.6

(TTAB 1988).

The most relevant registrations are for WILSON, COLLEGIATE PACIFIC, and UNILETE because they are, in fact, use-based registrations. However, these registrations appear to be house marks. While they may show that there is some relationship between sporting goods, it hardly is evidence that goods as different as adjustable soccer goals and a dumbbell system are closely related. Id.

The examining attorney has also included numerous printouts from the Internet. There are several pages of search results from the Yahoo site. A sample of some of the search results follows:

Gloves - mask/helmet Fitness equipment - multi station  
- dumb-bells - 5/8 ... ropes) Snowshoes (junior and  
senior) plastic Soccer - balls (indoor/outdoor...  
www.learning.gov.ab.ca

... \$4.99 VINTAGE WOODEN DUMB BELLS/BAR BELLS - 1 LB -  
. ... Soccer balls, Pumps, Gloves, Socks, Shin  
Guards[,] Jerseys[,] Shoes, Cleats[,] Shorts, Pants[,]  
Other...  
www.4sportsdeals.com

These results are too cryptic to demonstrate that soccer and exercise equipment are related. In addition, the fact that exercise and soccer products are sold on the same websites such as www.bestpriceontv.com and www.ebay.com does not show that consumers would expect the sources of these products to be associated or related. Federated Foods, 192 USPQ at 29 ("A wide variety of products, not only from different manufacturers within an industry but also from diverse industries, have been brought together in the modern supermarket for the convenience of the consumer. The mere existence of such an environment should not foreclose further inquiry into the likelihood of confusion arising from the use of similar marks on any goods so displayed"). See also Irwin Auger Bit Co. v. Irwin Corp., 134 USPQ 37, 39 (TTAB 1962):

It is common knowledge that there are sold in many hardware, grocery, variety and drug stores an almost unlimited variety of goods including tools, housewares, electrical appliances, seed, fertilizer, furniture and toys. The public being well aware of the diversity of goods to be found in such stores is not going to believe that all of those goods could originate with a single source.

Websites like conventional stores often serve to bring together various products from unrelated sources. The mere fact that goods are sold in the same store or on the same website does not establish that the goods are related, much less closely related.

Therefore, when we consider the nature of the marks in this case and the fact that the goods are not closely related, we conclude that confusion is not likely.

Decision: The examining attorney's refusal to register under Section 2(d) is reversed.